

Hon. Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

MARTYN STEWART, d/b/a,
NATURESOUND.ORG,

Plaintiff,

v.

APPLE INC., MITCH WAITE GROUP
LLC, AND MITCHELL WAITE,

Defendants.

No. 2:10-cv-01012-RSL

APPLE INC.'S MOTION TO DISMISS
AND NOTICE OF JOINDER IN
DEFENDANTS MITCH WAITE
GROUP LLC'S AND MITCHELL
WAITE'S MOTON TO DISMISS FOR
FAILURE TO STATE A CLAIM

Note on Motion Calendar:
October 1, 2010

Defendant Apple Inc. ("Apple") joins the pending motion of defendants Mitch Waite Group LLC and Mitchell Waite (collectively, the "Waite Defendants") and moves the Court (i) for dismissal of plaintiff Martyn Stewart, d/b/a, Naturesound.org's ("Stewart's") complaint in its entirety pursuant to Federal Rule of Civil Procedure 12(b)(6), (ii) alternatively, for dismissal of the claims for statutory damages and attorneys' fees, and (iii) alternatively, for leave to take early, expedited discovery regarding Stewart's asserted registration. The basis for this motion and joinder are the Waite Defendants' motion to dismiss (Dkt. # 6) (the "Waite Motion"), this motion and joinder and the declaration of

1 Gregory F. Budney (“Budney Declaration”) filed herewith, the pleadings, records and files
2 herein, oral arguments of counsel, and such other matters as the Court deems proper.

3 Plaintiff Stewart’s sole claim against Apple fundamentally depends on his copyright
4 infringement claim against the Waite Defendants—if the Waite Defendants’ iBird software
5 applications do not infringe a copyright owned by Stewart, then the claim against Apple
6 fails. *See, e.g.*, Complaint ¶¶ 15-16 (alleging Apple’s distribution and use of iBird).

7 Because the Waite Motion demonstrates that Stewart has not adequately pled copyright
8 infringement by the Waite Defendants, the claim against Apple must also be dismissed.

9 Dismissal of the complaint is appropriate because it fails to establish ownership of
10 the copyrights at issue and also fails to plead infringement of the compilation Stewart
11 sought to register. The complaint fails to establish ownership because: (i) if Stewart sought
12 to register a compilation, he has failed to allege that he is the author of that compilation,
13 Motion at 6-7; and (ii) if Stewart sought to register the individual underlying bird sound
14 recordings, he was forbidden to register them in a single registration because they had been
15 (as he alleges) previously published separately, Motion at 7-8. Dismissal is also appropriate
16 because, even if Stewart did register a compilation, he has failed to plead infringement of
17 that compilation; instead, he has pled only infringement of the (unregistered) individual bird
18 sound recordings rather than the subject of Stewart’s application: the “selection,
19 coordination or arrangement” of those recordings. Motion at 8-9.

20 There is substantial reason to conclude that the complaint’s defects reflect deeper
21 problems with Stewart’s claims. As detailed in the Budney Declaration, Cornell University
22 has analyzed iBird Explorer Pro—one of the software products at issue—and has concluded
23 that it owns the copyright in at least some of the bird sound recordings contained in that
24 software application. Budney Decl. ¶ 5. Consequently, Stewart’s application to register the
25 compilation instead of the underlying recordings may reflect a lack of ownership rather than
26 a mistaken view regarding the effect of registering a compilation. Regardless of the source

1 of the defects, it is appropriate to dismiss the complaint in its entirety for the reasons set
 2 forth in the Waite Motion. At the very least, the complaint should be dismissed with leave
 3 to amend to include a proper registration. Such a result would force Stewart to provide
 4 prima facie evidence of copyright ownership, thereby serving one of the fundamental goals
 5 of requiring registration to commence suit.¹

6 Alternatively, dismissal of the claims for statutory damages and attorney's fees is
 7 appropriate as to Apple: Stewart alleges registration of the purported copyrights after the
 8 first alleged infringement of his works, and these remedies are available only in cases where
 9 registration occurs before the first alleged infringement. Motion at 9-10. Finally, Apple
 10 joins the Waite Defendants' request for expedited discovery on the issue of the validity of
 11 Stewart's registration, given the substantial questions raised about that registration
 12 (including those presented in the Budney Declaration), and the requirement that Stewart
 13 have a valid registration to prosecute any copyright claim. Motion at 10-12.

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 25 ¹ Apple contends that this motion can and should be granted on its face pursuant to FRCP 12(b)(6); but, if the
 26 Court concludes that it cannot grant the motion without relying on the Budney Declaration, Apple requests
 that the Court convert this motion to a motion for summary judgment pursuant to FRCP 12(d).

1 DATED: September 8, 2010.

2 Respectfully submitted,

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4 By: /s/ David R. Eberhart

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to:

Philip P. Mann
Mann Law Group

Attorneys for Plaintiff

John E. Whitaker
Whitaker Law Group

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 8th day of September, 2010 at Seattle, Washington.

s/ Kelly M. Kennedy
Kelly M. Kennedy, Legal Assistant